

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Consumer And Governmental Affairs Bureau)	CG Docket No. 18-152
Seeks Comment On Interpretation Of The)	
Telephone Consumer Protection Act In Light)	
Of DC Circuit’s <i>ACA International</i> Decision)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

COMMENTS OF TCN INC.

TCN Inc. (“TCN”) respectfully submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau’s Public Notice seeking comment on Telephone Consumer Protection Act (“TCPA”) issues in response to the D.C. Circuit’s recent *ACA International* decision.¹

TCN’s cutting-edge call center platform supports efficient, effective communications between businesses and the customers they serve. TCN dedicates significant resources to developing technologies that both optimize operations and help its customers adhere to TCPA regulations. Over the years, the Commission has created an unnecessarily complex regulatory landscape for TCPA compliance, especially with respect to its decisions interpreting the

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, Public Notice, CG Docket Nos. 18-152, 02-278, DA 18-493 (rel. May 14, 2018); *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

definition of “automatic telephone dialing system” (“ATDS”). TCN encourages the Commission to provide a reasonable interpretation of ATDS that is consistent with the statutory language of the TCPA and congressional intent. And at minimum, the Commission should confirm that calls placed with any degree of human intervention are not made using an ATDS.

About TCN

TCN is a leading provider of cloud-based call center technology for enterprises, contact centers, and collection agencies worldwide.² Founded in 1999, TCN combines a deep understanding of the needs of call center users with a highly affordable delivery model, ensuring immediate access to robust call center technology, including interactive voice response, call recording, and business analytics required to optimize operations and adhere to TCPA regulations. Its “always-on” cloud-based delivery model provides customers with the ability to quickly and easily scale and adjust to evolving business needs. TCN serves various Fortune 500 companies and enterprises in multiple industries, including newspaper, collection, education, healthcare, automotive, political, customer service, and marketing. TCN and its more than 1600 satisfied customers look forward to the adoption of a TCPA framework that better serves businesses and consumers alike.

The Commission Should Provide a Reasonable Interpretation of ATDS

The Commission should seize the opportunity to provide much-needed clarity to good-faith businesses. The unreasonably broad interpretation of ATDS adopted in the Commission’s

² See TCN, Inc., *Hands Down Hosted: TCN, Inc. in Brief*, TCN, https://www.tcn3.com/home/wp-content/uploads/2014/04/MKT-215_WHITEPAPER_In-Brief_1.2.pdf.

2015 *Omnibus Order* has turned the TCPA landscape into a breeding ground for frivolous lawsuits.³ As Commissioner O’Rielly explained, “[n]eedless . . . lawsuits” chill efforts by “good actors and innovators” to develop “new consumer-friendly communications services.”⁴ By expanding “ATDS” to potentially include devices such as smartphones and tablets, the Commission put a litigation target on honest businesses trying to communicate with their customers.

TCN encourages the Commission to confirm that the term ATDS only includes equipment that has and uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention. In doing so, the Commission should grant the Petition for Declaratory Ruling filed recently by numerous leading industry associations.⁵

The statutory definition of an ATDS supports this approach. The TCPA defines an automatic telephone dialing system as “equipment which *has the capacity*—(A) to store or produce telephone numbers to be called, *using* a random or sequential number generator; and (B) to dial such numbers.”⁶ An ATDS is therefore equipment that “*has the capacity*” to store or produce numbers *using* a random or sequential number generator, and the TCPA only restricts as

³ For example, the Commission interpreted the term “capacity” to include a device “even if, for example, it requires the addition of software to actually perform the functions described in the definition.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7975 ¶ 18 (2015) (“*2015 Omnibus Order*”).

⁴ Commissioner Michael O’Rielly, *TCPA: It Is Time to Provide Clarity*, FCC Blog (Mar. 25, 2014, 2:10 PM), <https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-is-time-provide-clarity>.

⁵ Petition for Declaratory Ruling, U.S. Chamber Institute for Legal Reform, *et al.*, CG Docket No. 02-278 (May 3, 2018); *see also* Public Notice at 3.

⁶ 47 U.S.C. § 227(a)(1) (emphasis added).

an ATDS equipment that both *has and uses* a random or sequential number generator. If a random or sequential number is not installed, the equipment falls outside the TCPA.

In the Public Notice, the Bureau also seeks comment on how to interpret “has the capacity” in the ATDS definition.⁷ TCN encourages the Commission to confirm that “has the capacity” means the “present ability” of the equipment at the time of the call. The D.C. Circuit noted that the Commission could interpret the statutory phrase “make any call . . . using [an ATDS],” to mean that a device’s ATDS capabilities must actually be used to place a call for TCPA restrictions to attach.⁸ Congress could have chosen a different tense and applied the definition to equipment that “had” or “could have” the capacity, but it did not, and the use of the present tense is instructive. Commissioner O’Rielly, too, supported this interpretation in his *2015 Omnibus Order* dissent. He said “it seems obvious that the equipment must have the capacity to function as an autodialer *when the call is made* not at some undefined future point in time. Moreover, the TCPA bars companies from using autodialers to ‘make any call’ subject to certain exceptions. This indicates that the equipment must, in fact, be used as an autodialer to make the calls.”⁹

The Bureau also seeks comment on whether an ATDS must dial numbers without human intervention.¹⁰ The Commission should confirm that calls made with any degree of “human intervention” are not made using an ATDS. The Commission’s prior vague, case-by-case analysis of each piece of dialing equipment causes confusion and incentivizes litigation. Finding

⁷ Public Notice at 2.

⁸ See *ACA Int’l*, 885 F. 3d at 704.

⁹ *2015 Omnibus Order*, Dissenting Statement of Commissioner Michael O’Rielly, at 4-5.

¹⁰ Public Notice at 2.

that even a single click of human intervention (akin to speed dialing) pushes technology outside the definition of an ATDS creates a clear rule for businesses to follow and courts to enforce.

Conclusion

For the reasons provided above, the Commission should adopt TCN's proposals for reforming its interpretation of an ATDS. Adopting a clearer, commonsense interpretation of an ATDS will give callers and consumers much-needed certainty and incentivize legitimate businesses to invest in efficient, compliant call center technologies, upgrade their communications platforms while retaining American call center jobs, and provide optimal service for consumers.

Respectfully submitted,

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